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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 631

YELLOW CAB COMPANY, A MAINE CORPORATION,

Petitioner,

vs.

DEMOCRATIC UNION ORGANIZING COMMITTEE, LOCAL 777, S. I. U. N. A., AFL-CIO.

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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December 6, 1968.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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QUESTION PRESENTED.

Did the Court of Appeals correctly affirm the judgment of the District Court which granted summary judgment enforcing the arbitrator's award, where the Court of Appeals found that the arbitrator had drawn the essence of his award from the collective bargaining agreement in finding (1) an employee's discharge wrongful and (2) that the union had satisfied the procedural requirements of the contract in bringing the employee's discharge to arbitration?

STATEMENT.

The petitioner is an employer that operates a fleet of taxicabs in Chicago, Illinois. Its collective bargaining agreement with the respondent labor organization contains a grievance procedure terminating in final and binding arbitration (App. 12).[1]

The Company had discharged an employee, and the Union grieved and subsequently requested arbitration. An arbitrator was mutually selected by the parties and the case was arbitrated under the procedures of the American Arbitration Association (App. 14-15). The Company contended that the Union had not filed the grievance in proper form and that the Union had not made a timely request for arbitration. The arbitrator considered and overruled these procedural objections (App. 24-25). As to the merits, he found that there had not been just cause for the discharge and he ordered the Company to pay the employee backpay to the date of the award (App. 30). The arbitrator denied reinstatement, however, on the ground that the employee had engaged in conduct subsequent to the wrongful discharge which rendered reinstatement inappropriate (App. 37).

After the Company filed in the District Court a petition to set aside the arbitrator's award, the parties filed cross motions for summary judgment. The district judge granted the Union's motion for summary judgment, finding that the arbitrator had not exceeded his authority under the collective bargaining agreement and that there was no showing of bias or partiality in the award. He further held that the arbitrator had considered and ruled on the Company's pro-

1. References to the printed appendix, certified by the Clerk of the Court of Appeals, are designated "App. ....." References to the separate printed appendix filed by petitioner are designated "P. A. .....".

cedural objections and that these matters were for the arbitrator to determine (P. A. 1-3).

On appeal the Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court, holding that the arbitrator's decision drew its essence from the collective bargaining agreement, both as to the merits and as to the procedural issues. The Court of Appeals rejected the Company's contention that the arbitrator was biased, and it held that the remedy which the arbitrator fashioned was within his discretion (Appendix A).[2]

2. The opinion of the Court of Appeals is printed as Appendix "A" to the petitioner's brief, pages 1a to 5a.

ARGUMENT.

The issue in the present case does not warrant review by this Court on certiorari. The petitioner is seeking to have the Court review the merits of the arbitrator's award, and it attempts by semantic devices to bypass the settled law that the merits of an arbitrator's award as to substantive and procedural matters are not to be reviewed by the courts.

Contrary to the contention of petitioner, there is no genuine conflict between the Circuit Courts. The decision of the Second Circuit Court of Appeals in *Torrington Co.* v. *Metal Products Workers Union,* 362 F. 2d 677 (1966), the only circuit court decision relied upon by the petitioner, is not in conflict with the present case. In *Torrington,* the Second Circuit stated that it accepted the basic principle that an arbitrator's decision on the merits is final as to questions of law and fact, and that the courts should not review the merits of an arbitrator's award so long as the award draws its essence from the collective contract (362 F. 2d 677, 680). This principle was followed in the present case by the Court of Appeals, as it has been followed in various other circuits which have considered this issue, *e.g., Kroger Co.* v. *Teamsters Local 661,* 380 F. 2d 728 (6th Cir. 1967); *Safeway Stores* v. *American Bakery Workers Local 111,* 390 F. 2d 79 (5th Cir. 1968); *Western Iowa Pork Co.* v. *Packinghouse Workers Local 52,* 366 F. 2d 275 (8th Cir. 1966); *Ficek* v. *Southern Pacific Co.,* 338 F. 2d 655, 656 (9th Cir. 1964), certiorari denied 380 U. S. 988 (1965); *Avco Corp.* v. *Mitchell,* 336 F. 2d 289, 291 (6th Cir. 1964); *Minute Maid Co.* v. *Citrus Workers,* 331 F. 2d 280 (5th Cir. 1964) (per curiam); *Newark Stereotypers Union No. 18* v. *Newark Morning Ledger Co.,* 397 F. 2d 594 (3rd Cir.

1968), certiorari denied, 69 LRRM 2653 (1968). The circuit courts, including the Second Circuit in *Torrington*, have adhered to the basic rule laid down by the Supreme Court in *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 596 (1960), that the Courts are not to review the merits of an arbitration award. On this issue there is no conflict.

In *Torrington*, however, the Second Circuit went on to deal with an issue which is not contained in the present case, *i.e.*, whether the arbitrator had authority to base an award upon a practice which had existed outside the contract with no express contractual provision covering the subject matter of the grievance. The Second Circuit held that in such case the award did not draw its essence from the collective contract (362 F. 2d 677, 682). In the present case, in complete contrast, the arbitrator based his award upon express contract provisions which protect employees against discharge without just cause (App. 9-11). As *Torrington* involves a review of an arbitrator's award based upon a substantive right *outside* the labor contract, and the present case involves an award based upon a substantive right *within* the labor contract, the two cases are fundamentally different. *Torrington* is not in point. There is no basis for the petitioner's claim that there is a conflict between the circuits.

Petitioner makes a specious argument in contending that there should be court review of the arbitrator's assumption of jurisdiction in the present case. But there was no real question of the arbitrator's jurisdiction. The issues raised by the Company were not jurisdictional, but procedural, *i.e.*, whether the Union had satisfied the contractual procedures with respect to the form of the grievance and the timeliness of the demand for arbitration. It is settled law that these procedural issues called for the arbitrator's construction of applicable language of the contract. They are not for the courts to decide. *John Wiley & Sons, Inc.* v.

Livingston, 376 U. S. 543, 557, 559 (1964); *Avco Corp.* v. *Mitchell, supra*, 336 F. 2d 289, 291 (6th Cir. 1964), where the court held squarely that the question of compliance with preliminary steps in the grievance procedure is procedural, and that it is for the arbitrator and not the courts to decide; *Local 824, Carpenters* v. *Brunswick Corporation*, 342 F. 2d 792, 794 (6th Cir. 1965), where the court said: "It is no longer open to question that procedural matters are for the arbitrator, and not the court, to determine"; *Local 51, I. B. E. W.* v. *Illinois Power Co.*, 357 F. 2d 916, 919 (7th Cir. 1966), certiorari denied, 385 U. S. 850 (1966); *Deaton Truck Line, Inc.* v. *Local Union 612*, 314 F. 2d 418, 422 (5th Cir. 1962); *Radio Corp. of America* v. *Assn. of Pro. Eng. Personnel*, 291 F. 2d 105, 110 (3rd Cir. 1961). Recently the Court denied certiorari in a case where the procedural rulings of an arbitration panel were attacked and where, as here, the provisions of the United States Arbitration Act 9 U. S. C. §§ 9, 10 were relied upon. *Newark Stereotypers Union No. 18* v. *Morning Ledger Co.*, 397 F. 2d 594 (3rd Cir. 1968), certiorari denied, 69 LRRM 2653, (November, 1968).

The Company and the Union agreed in their contract that the arbitrator's award should be "final, conclusive and binding upon all parties." (App. 12.) To subject the procedural rulings of the arbitrator to court review would mean that labor arbitration awards would no longer be final and binding despite the agreement of the parties, but would instead become independently reviewable by the courts on the same issues which were litigated and disposed of by the arbitrator. This would destroy the finality of arbitration awards. It would have the undesirable result that awards would become the beginning rather than the end of industrial disputes, and it would make a jurisdictional issue out of trifling procedural matters. When it is considered that virtually all industrial arbitrations fol-

low grievance procedures which are handled by laymen on both sides, it is readily apparent that chaos would result.

Finally, petitioner argues somewhat indirectly that the arbitrator showed "partiality" because he ordered back-pay while denying reinstatement to the grievant. Inasmuch as the denial of reinstatement was a substantial award in favor of the Company, it is difficult to understand how the charge of partiality can even be suggested. The district court and the Court of Appeals rejected the contention (App. 54; App. "A", page 5a). The Court of Appeals reasonably pointed out that the contract left the arbitrator free to exercise his discretion in devising a remedy, and that there was no inconsistency in the remedy because it was *after* the grievant had been wrongfully discharged that he engaged in the conduct which caused the arbitrator to deny reinstatement. In *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 597 (1960) the Court recognized the need for flexibility in remedies devised by arbitrators. See also *Kroger Co.* v. *Teamsters Local 661, supra,* 380 F. 2d 728, 732. The petitioner really contends that the arbitrator was "partial" because he did not rule in favor of the petitioner. The rather tasteless and unwarranted claim of partiality is simply a semantic device of the petitioner to make the petition appear to be something other than what it is, *i.e.*, an effort to obtain a review of the merits of the arbitrator's award.

There are no special or important reasons for this case to be reviewed by the Court. There is no conflict among the circuit courts. The judgment below is consistent with applicable decisions of this Court.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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